



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 17, 1996

Mr. David R. Gipson  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR96-2417

Dear Mr. Gipson:

You previously asked whether certain information is excepted from required public disclosure as "attorney work product" under the Texas Open Records Act, chapter 552 of the Government Code. In Open Records Decision No. 647 (1996), this office established the requirements for withholding information as attorney work product under section 552.111 of the Government Code. In that decision we also provided the Texas Department of Agriculture (the "department") an opportunity to explain how it has met those requirements for the records at issue.<sup>1</sup> You have now submitted your arguments to this office.<sup>2</sup> Your most recent correspondence was assigned ID# 102376.

The first requirement that must be met to consider information "attorney work product" is that the information must have been created for trial or in anticipation of litigation. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

---

<sup>1</sup>For purposes of this ruling, we assume, without deciding, that the department may invoke the attorney work product privilege on behalf of its outside counsel.

<sup>2</sup>You also contend that the information at issue is excepted from required public disclosure pursuant to the attorney-client privilege as incorporated into section 552.107(1) of the Government Code. We note, however, that you did not raise this exception within the ten days following the department's receipt of the open records request. See Gov't Code § 552.301. Consequently, we deem section 552.107 waived. See Open Records Decision No. 515 at 6 (1988) (new exceptions cannot be raised after initial ten days absent compelling reason for consideration), *see also* Open Records Decision No. 630 (1994) (mere fact that information comes within attorney-client privilege not compelling reason for non-disclosure).

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

*See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204.

After reviewing the totality of the circumstances surrounding the department's investigation, we believe that both of these tests have been met with regard to most of the records you have submitted to this office. Some of the documents, however, appear to have been created as a result of open records requests received by the department. These records, while tangentially related to the department's litigation, were not "created for trial or in anticipation of litigation" and thus may not be withheld as attorney work product. Consequently, the department must release in their entirety the documents Bates-stamped 000030 and 000036-37.<sup>3</sup>

Similarly, we also note that the documents Bates-stamped 000023-24 were created for the sole purpose of responding to inquiries from the press. It is not apparent, and you have not explained, what role these documents played in the attorney's preparation for litigation. These two documents must also be released in their entirety.

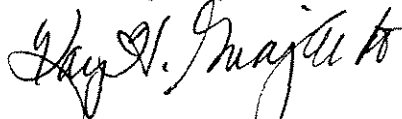
The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 (1996) at 4. Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* and authorities cited therein. We agree that much of the information at issue meets this standard. Some of the records at issue, however, were neither created by an attorney nor created at the direction of an attorney. These types of records may not be withheld as attorney work product, regardless of the fact that they were forwarded to an attorney in connection with the litigation, because they do not reveal the "mental processes, conclusions, and legal theories of the attorney." *See National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993). Consequently, the department must release the documents Bates-stamped 000006-7 and 000013.

---

<sup>3</sup>It is not clear to this office whether the subject matter of the information we have marked in documents Bates-stamped 000032 and 000038-39 also pertain to an open records matter. If such is the case, the information we have marked must also be disclosed.

Except as discussed above, all of the remaining records you submitted to this office may be withheld as attorney work product pursuant to section 552.111 of the Government Code. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hamilton Guajardo  
Assistant Attorney General  
Open Records Division

KHG/RWP/rho

Ref.: ID# 102376

Enclosures: Marked documents

cc: Ms. Susan Newhams  
Information Specialist  
Holme Roberts and Owen  
1700 Lincoln, Suite 4100  
Denver, Colorado 80203  
(w/o enclosures)